IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.354 OF 1994

The State of Maharashtra Appellant

Vs.

Sajutali Mahibub ali Banva
Sarjuri, age 82, r/o Mirasab,
Darga, Miraj, Dist. Sangali Respondent

Smt. V.R. Bhosale, APP for Appellant-State.
Mr. Ayaz Khan with Mr. Pradeep Hingorani i/b Mr.A.P. Mundargi for Respondent.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : September 07, 2004.

ORAL JUDGMENT (PER S.S. PARKAR,J.).:

1. This appeal is filed by the State against the Judgment and Order dated 9/3/1994 delivered by the IIIrd Additional Sessions Judge, Satara acquitting the respondent-accused of offences under Sections 18 and 20(b)(i) of the N.D.P.S. Act in Sessions Case No.73 of 1992.

2. The prosecution case briefly stated is as follows:-

P.W.2 Head Constable Shankar Khirsagar, attached to Umbraj Police Station, received an information on 27/1/1988 regarding accident of a motorcycle. He, therefore, went to the place of accident, where he

found Luna vehicle bearing No.MXD/6538 was involved in the accident and the accused had received injuries as a result of which he was lying unconscious. The injured accused was sent to Cottage Hospital, Karad, for examination and treatment. Panchanama of the place of accident was drawn and the vehicle was brought to the police station. After reaching at the police station PW 2 Head Constable Khirsagar took search of vehicle in the presence of panchas. After opening the dicky of the motorcycle, ganja about 750 gms. and some other bags of powders were found. Samples were drawn. The articles were seized and sealed under the signatures of the officer and the panchas. The sealed packets were kept at the police station. The complaint Exh.12 was filed by PW 2 and the crime was registered under C.R. No.21/88 for offence under Section 66(1)(b) of the Bombay Prohibition Act and for offences under Sections 18 and 27 of the N.D.P.S. Act. Investigation was carried out by PW 2 Head Constable Shankar Khirsagar. Accused was arrested on 1/2/88 under arrest panchanama Exh.13. The samples of ganja and the other seized powders were sent to C.A. along with forwarding letter dated 30/1/88 and the reports of the C.A. were received at Exhs.15 and 16. As per the C.A. Reports the samples were found to be of heroin, ganja and opium. After

completion of the investigation, charge-sheet came to be filed against the accused for offence under Section 66(1)(b) of the Bombay Prohibition Act and for offences under Sections 18 and 27 of the N.D.P.S. Act, 1985. The case was committed to the Sessions Court.

3. Before the Sessions Court charge was framed for offence under Section 18 and 20(b)(i) of N.D.P.S. Act, 1985 to which the accused pleaded not guilty. On behalf of the prosecution 3 witnesses were examined. PW 1 is Nandkumar Ganpat Salunkhe, the panch for the seizure of the contraband articles. PW 2 is Head Constable Shankar Khirsagar, who is the complainant and Investigating Officer who lodged F.I.R. Exh.12. PW 3 is Police Constable Anandrao Bajirao Nalawade, who had carried the samples to the office of C.A. The defence of the accused was of denial. He had admitted about the accident and that he was driving the Luna vehicle and he had sustained injury due to the accident. He had denied that in the dicky of his vehicle ganja, opium and charas were found.

4. After considering the entire evidence on record, the learned IIIrd Addl. Sessions Judge, Satara acquitted the respondent-accused of the offences with

which he was charged, by disbelieving the seizure, for non-explanation of the custody of the sample packets by the prosecution and for non-compliance of Section 57 of the N.D.P.S.Act.

5. We have gone through the entire evidence on record and heard both the sides at length. The learned defence advocate contended that this is an appeal against acquittal and the reasoning of the trial court is not perverse and, therefore, there will be no justification to interfere in the order of acquittal by this court. Secondly, he contended that there is clear violation of provisions of N.D.P.S. Act, in particular Sections 52, 55 and 57 of the Act. In support of his contentions he has also relied on the judgments of this Court and Supreme Court.

6. The main crux of the argument of the learned defence advocate is that under Section 52 of the act, after seizure of the contraband, the Investigating Officer is duty bound to forward the accused and seized articles without unnecessary delay to the officer-in-charge of the nearest police station. Secondly under Section 55 of the Act, an officer in-charge of a police station had to take charge of all the articles seized and keep in safe custody and put his seal on seized articles, including samples. Under Section 57 of the Act, the person making arrest

and seizure is required to make a full report of all the particulars of such arrest and seizure to his immediate official superior within 48 hours.

7. From the evidence of PW 2 Shankar Khirsagar, it appears that one PSI was attached to the Umbraj Police Station at the relevant time and it is admitted by him that he had not obtained signature of PSI on the sealed packets. The prosecution has not produced the register under which the seized articles and the samples were handed over to the officer-in-charge of the police station. PW 2 has only deposed that seized property was preserved in the store room at the police station. PW 3 Anandrao Nalawade, who is Police Constable, has deposed that the seized property was kept in the store room at the police station which was entrusted to the concerned clerk. There is no evidence of handing over of the seized articles to the officer-in-charge of the police station as required under the aforesaid provision. It is not in dispute that since the accused had received injuries and had become unconscious he was admitted to the hospital when the contraband articles were seized from the dicky of the vehicle and, therefore, he was not present at the time of seizure. No register is produced by the prosecution to prove that the seized

articles were handed over to the concerned clerk or were handed over to the officer-in-charge of the police station and that they were kept in the store room at the police station and the samples were withdrawn from there.

8. Secondly, what is significant to point out is that the Investigating Officer stated that the samples, which were to be sent to the office of C.A., were handed over to constable Nalawade PW 3 on 30/1/1988 and the samples had reached the office of C.A. on 4/2/1988. Significantly, constable Nalawade PW 3, who had carried the samples to the office of C.A., has categorically stated that the sealed packets along with forwarding letter were handed over to him on 4/2/1988 itself, on which day he carried the same to the office of C.A. He has categorically denied in the cross-examination that he had received the property and the forwarding letter on 30/1/1988 as deposed to by PW 2 Head Constable Khirsagar, who had investigated the case. This shows that the prosecution is not sure as to where the samples were kept between 30/1/1988 and 4/2/1988 before they were handed over to the office of C.A. In the absence of signature of the accused on the sealed packets, the learned defence advocate rightly contended that the possibility of

tampering with the samples during that period of four days cannot be ruled out as held by the Division Bench of this court in the case of Mohd. Hussain Babamiyan Ramzan vs. State of Maharashtra reported in **II (1994) CCR 1223 (DB)**.

9. Reliance is also placed on the decision of the Supreme Court in the case of Gurbax Singh vs. State of Haryana reported in **2001 AIR SCW 670** to show that if there is non-compliance of Sections 52, 55 and 57 of the Act, doubt would be created whether the same sample was sent to the C.A. In para 9 of the judgment, the Supreme Court has observed that though Sections 52 and 57 are directory, violation of these provisions cannot be totally ignored and the failure to comply with those provisions will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the articles. There is no evidence led by the prosecution to the effect that the seized articles were kept in the store room of the police station by making entries in the register which is generally maintained at the police station nor there is any evidence to show that the procedure prescribed under Section 57 of the Act of sending full report of all the particulars of arrest and seizure to the immediate officer superior was followed. In the

context of the contradiction in the evidence of PW 2 and PW 3 as to when samples in question were handed over to PW 3 for being taken to the office of C.A. doubt is created whether the samples, which were drawn from the contraband allegedly recovered from the dicky of the motorcycle in the absence of the accused, were the ones which were sent to the office of C.A. on 4/2/1988 in respect of which the prosecution has produced the C.A. report.

10. One more aspect, which is commented upon by the learned defence advocate is where the key of the motorcycle was found. Before the seizure of the contraband articles the motorcycle was seized and attached under panchanama which was drawn at the place of accident and thereafter it was brought to the police station. However, that panchanama which was drawn at the place of accident is not produced to show that the vehicle in question, from the dicky of which contraband was seized, was the same which was seized under the panchanama drawn at the place of accident due to which the accused is sought to be connected with the contraband in question. Thus, in the absence of the production of panchanama of seizure of the vehicle from the place of accident, the accused cannot

be connected with the vehicle in question, from the dicky whereof the contraband was allegedly seized.

11. In the aforesaid circumstances, there is absolutely no warrant to interfere in the order of acquittal recorded by the trial court in the appeal against the order of acquittal.

12. In the result the order of acquittal recorded by the IIIrd Additional Sessions Judge, Satara on 9/3/1994 in Sessions Case No.73 of 1992 is confirmed and appeal is dismissed. The bail bonds of the respondent-accused shall stand cancelled.

(S.S. Parkar, J.)

(S.R. Sathe,J.)